(2012) 12 DEL CK 0230

In the Delhi High Court

Case No : CS (OS) No. 2384 of 2000

The New India Assurance Co. Ltd. APPELLANT

Vs

M/s. Bhagwati Transport Co. and Others RESPONDENT

Date of Decision : 07-12-2012

Acts Referred:
Carriers Act, 1865 — Section 6, 9

Citation : (2012) 12 DEL CK 0230

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Salil Paul, for the Appellant;

Final Decision : Disposed Off

Judgement

Valmiki J Mehta, J.—This is a suit filed by the plaintiff-Insurance Company as a subrogee of the defendant no. 3, in whose favour an Insurance policy was issued for the consignment which was transported by the defendant Nos. 1 and 2. Essentially, the suit is under the Carriers Act, 1865 against the Carrier for recovery of amount being the value of the lost goods, and which amount the plaintiff-Insurance Company paid to the beneficiary of the policy viz. defendant No. 3. The facts of the case are that the defendant No. 3/M/s. Sony India Pvt. Ltd. is a company which manufactures TV sets and electronic goods. Defendant No. 3 purchased from the plaintiff a Multi Transit Marine Policy (Cargo) number 213107000357 for the period 30.5.97 to 29.5.1998. The policy was for a total amount of Rs. 400 crores and for multi transit and storage of electronic items. The defendant No. 3 wanted transportation of its electronic goods from Dharuhera, Haryana to ICD Tughlakabad, Delhi for their further export to Singapore and Dubai. The goods were entrusted for transportation by the defendant No. 3 to the defendant No. 1/Carrier, and of which Carrier the defendant No. 2 is the sole proprietor. The goods were entrusted to the defendant Nos. 1 and 2 vide GRs dated 6.10.1997 and 14.10.1997. The vehicle in which the goods were transported was lorry No. DIL-3591. The case of the plaintiff and the defendant No. 3 is that the vehicle DIL-3591 was standing outside ICD Tughlakabad, New Delhi for entry and clearance, when a criminal gang who specialized in removing goods from inland containers outside the ICD Tughlakabad, New Delhi with the connivance of the driver and agents of the transporters/defendant Nos. 1 and 2, managed to pilfer goods by breaking open the seals of the containers and resealing them. This gang pilfered 325 Sony coloured television sets from the containers in the lorry. Since the containers were re-sealed, the theft only came to the knowledge of the defendant No. 3 when the containers reached its destination at Singapore where the 325 number of television sets were found to be short. Consequently, an FIR No. 283/1997 was lodged with the police station, Okhla Industrial Area, New Delhi. After registration of the case, the police was successful in nabbing the culprits and recovered 98 coloured TV sets. Defendant No. 3 recovered back 97 coloured TVs from the police and one TV was retained by the police as a sample at their Malkhana. Defendant No. 3 thereafter in terms of the insurance policy lodged a claim with the plaintiff who appointed M/s. ILAS Surveyors and Loss Assessors Pvt. Ltd. to survey and investigate the incident. The survey agency submitted their reports and confirmed the theft of 325 coloured TV sets. The loss assessors also reported that an organized gang of criminals operate when the trucks containing the containers are queued up outside ICD Tughlakabad, and with the connivance of the drivers and the agents of the carriers they steal the goods after breaking open of the seal and thereafter resealing the containers. Plaintiff avers that this news was also published in the major newspapers in the capital on 15/16.12.1997. The plaintiff paid the claim amount to the defendant No. 3 under the policy. The defendant No. 3 also served the necessary notice dated 5.12.97 under the Carriers Act, 1865 upon the defendant No. 1 seeking to re-compense. The said notice under the Carriers Act, 1865 was duly served upon the defendant No. 1, but the same had no effect. Plaintiff further pleads that it paid a sum of Rs. 46,51,901/- to the defendant No. 3 in full and final settlement of its claim under the policy, for the loss/damages suffered by the theft. The plaintiff further pleads that the defendant No. 3 after settlement of its claim, issued a letter of subrogation, power of attorney and other relevant documents in favour of the plaintiff which has then filed the suit for recovery of the amount which is a loss caused on account of the illegal action of the Carrier/defendants No. 1 & 2.

2. The defendants No. 1 and 2 appeared and filed their written statement. It was pleaded by the defendants No. 1 and 2 that goods were not stolen while the same were in the custody of the defendants No. 1 and 2. It was denied that the defendants No. 1 and 2 were liable. It was pleaded that actually the goods were stolen at the godowns of the Railways.

3. The following issues were framed in this suit on 26.8.2004:-

1. Whether defendants 1 and 2 took due care and caution while goods were in their possession? OPD.

2. Whether the goods were not stolen while these goods remained under the custody of defendants 1 and 2? OPD.

3. Whether the plaintiffs were in connivance with defendant No. 3, the Insurer of the goods ? OPP.

4. Whether the plaintiff is entitled to the suit amount. If so to what amount? OPP.

5. Relief.

Issue Nos. 1 and 2

4. Issue Nos. 1 and 2 can be taken up together. Issue No. 1, in my opinion, has to be decided in favour of the plaintiff and against the defendants No. 1 and 2 inasmuch as liability of a carrier under a contract of transportation is absolute. Unless and until it is proved on record by the carrier/transporter that the loss or damage occurred due to act of God or enemy of State, the carrier is absolutely liable. Even expression ''act of God'' is considered strictly to be not force majeure but vis major. Stealing of the goods during transportation will not be act of God. The judgment of the Supreme Court in this regard is of Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd., . The ratio of the judgment is properly encapsulated in the headnote of the said judgment and which reads as under:-

The liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable of any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants.

....

Section 6 of the Carriers Act enables the common carrier to limit his liability by a special contract. But the special contract will not absolve the carrier if the damage or loss to the goods, entrusted to him, has been caused by his own negligence or criminal act or that of his agents or servants. In that situation, the carrier would be liable for the damage to or loss or non-delivery of goods. In this situation, if a suit is filed for recovery of damages, the burden of proof will not be on the owner or the plaintiff to show that the loss or damage was caused owing to the negligence or criminal act of the carrier as provided by Section 9. The carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State (or the enemies of the King, a phrase used by the Privy Council).

(Underlining added)

5. Another judgment of the Supreme Court which reiterates the same legal position is of Patel Roadways Limited Vs. Birla Yamaha Limited, . Again the headnote of the said judgment encapsulates the ratio of the said judgment and

the same reads as under:-

The liability of a common carrier under the Carriers Act is that of an insurer. This position is made further clear by the provision in Section 9, in which it is specifically laid down that in a case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence. Even assuming that the general principle in cases of tortuous liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to a case covered under the Carriers Act. This is also the position notwithstanding a special contract between the parties.

However, the absolute liability of the carrier is subject to the exception where the loss or damage arises from an act of God. An act of God as has been observed by a Division Bench of the Madras High Court in P.K. Kalasmi Nadar case, will be an extraordinary occurrence due to natural causes, which is not the result of any human intervention and which could not be avoided by any amount of foresight and care, e.g. fire caused by lightning; but an accidental fire though it might not have resulted from any act of or omission of the common carrier, cannot be said to be an act of God.

(Underlining added).

6. Therefore, in the facts of the present case, the defendants No. 1 and 2 cannot avoid their liability because their liability is equal to the liability of an insurer. Merely because the defendants No. 1 and 2 state that they took due care and caution is not enough inasmuch as unless an act of God or enemy of State is proved, and which is not so proved on behalf of the defendants No. 1 and 2, the defendants No. 1 and 2 are liable.

7. I may note that in the cross-examination of the witness DW1, Sh. Anuj Mehta who appeared on behalf of the defendants No. 1 and 2, he has admitted three vital points. First admission was that there were cases of pilferages during the relevant days from lorries standing in queue outside ICD, Tughlakabad. The second admission is that there was a long queue of about 40 to 45 lorries outside ICD, Tughlakabad on the day when the goods of the defendant No. 3 were to be unloaded at the ICD. The third admission made by this witness is that he cannot tell whether the driver or his helper remained in the vehicle during the time when the lorries stood in the queue before entering into the ICD, Tughlakabad godown. These admissions show that the defendant failed to discharge his onus to prove that the theft was on account of an act of God. Once the driver and the cleaner are not always at the vehicle, there would be negligence of the Carrier/ transporter. This liability of the Carrier to ensure that at all points of time care of vehicle and the containers is taken is more pronounced in this case because the witness admitted that during the relevant days there used to be theft outside ICD, Tughlakabad and the lorry on which the containers in question were being transported, was standing in a queue of about 40 to 45 vehicle.

8. I therefore hold the issue no. 1 in favour of the plaintiff and against the defendants No. 1 and 2.

9. So far as the issue No. 2 is concerned, the plaintiff has filed and proved on record the FIR with respect to the incident as Ex. PW1/11. The FIR is based on the complaint of defendant No. 3 to the police which is Ex. PW1/10 dated 18.11.1997. No doubt remains that the goods of the defendant No. 3 were stolen because the plaintiff proved as PW1/12 the document dated 13.5.1998 issued by the police authorities which shows that out of the total stolen 325 Sony coloured TVs, 227 TVs have not been recovered and only 98 coloured televisions have been released to the defendant No. 3. Accordingly, it is clear that the theft took place of the coloured television sets when they were in custody of the defendants No. 1 and 2 through their agents/employees viz. the driver and cleaner of the vehicle in which the containers containing the goods were being transported.

10. Issue No. 2 is also therefore decided against the defendants No. 1 and 2 and in favour of the plaintiff.

Issue No. 3

11. This issue is as to whether there is any connivance of the plaintiff with the defendant No. 3. In my opinion, this is a frivolous issue raised by the defendants Nos. 1 and 2 inasmuch as why should a plaintiff/Insurance Company collude with its beneficiary and pay out lacs of rupees under an insurance policy unless actually there was theft. I may note that the plaintiff has in this regard proved on record the survey report of the surveyor as Ex. PW1/DA. This survey report establishes the loss of the coloured television sets by theft.

12. This issue is therefore also decided in favour of the plaintiff and against the defendants No. 1 and 2.

Issue No. 4

13. The plaintiff as an Insurance Company has proved on record the insurance cover note as Ex. PW1/4, the receipt as Ex. PW1/16 showing that amount of Rs. 46,51,901/- has been paid by the plaintiff to the defendant No. 3. Legal notice under the Carriers Act, 1865 has been proved and exhibited as Ex. PW1/15. The plaintiff has also averred that it has become the subrogee by having paid the amount under the policy to the defendant No. 3. On payment of the amount under the policy to the defendant No. 3, the plaintiff stands substituted in place of the defendant No. 3 to recover the amount from the defendants No. 1 and 2 because of whose negligence the goods which were sent for transportation by the defendant No. 3 to ICD, Tughlakabad, New Delhi were lost. Accordingly, the plaintiff is entitled to the principal amount of Rs. 46,51,901/-. The plaintiff will also be entitled to pendente lite and future interest at the rate of 12% per annum.

Relief.

In view of the above, suit of the plaintiff is decreed against the defendants No. 1 and 2 for a sum of Rs. 46,51,901/- alongwith pendente lite and future interest at 12% per annum simple. The plaintiff will also be entitled to costs of the suit. Decree sheet be prepared. Suit is decreed and disposed of accordingly.

